SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-116

FRANK JOSEPH CARACCI,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals is reported in ____ F.2d. ____, and is incluuded herein as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered June 2, 1971, No. 29832. Appendix B. The petition for rehearing was denied June 25, 1971. Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether entrapment is a matter to be determined by Judge or jury.

2. Whether the accused was denied a fair trial by a jury he did not select.

3. Was petitioner deprived of his right to final summation.

STATUTE INVOLVED

Federal Rules of Criminal Procedure, Rule 12:

"(b) The Motion Raising Defenses and Objections. (1) Defenses and Objections Which May be Raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion."

Title 18, United States Code 201(b) and (f):

"(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent —

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty . . ."

"(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; . . ."

STATEMENT OF THE CASE

FRANK CARACCI took the stand in his own behalf and on direct examination testified as to the events surrounding the dates of these offenses, and before. Petitioner readily acknowledges that this testimony is the principal source of the following statement.

FRANK CARACCI operates an entertainment business in New Orleans, he owns considerable property and has various other business interests. FRANK CARACCI has had tax problems in the past. These taxes

include income, amusement, franchise, excise and sales taxes. Recently he successfully challenged a tax assessment as arbitrary and excessive. The challenge was made in lengthy civil litigation in which CARACCI eventually prevailed. MR. CARACCI believes his problems that culminated in this case began soon after the completion of this civil trial.

Sometime in 1968 MR. CARACCI became aware of the fact that agents of the Internal Revenue Service were making inquiries about him to his associates and business acquaintances. MR. CARACCI admittedly discussed his tax problems with many people, one of whom was "SONNY VAUCRESSON".

CARACCI became more aware of his new tax problem when Internal Revenue Service agent, A. J. Moline, began to make a series of calls on CARACCI at his place of business.

CARACCI states that on many occasions he pleaded with agent Moline to complete his audit and establish the amount of his tax liability. According to CARACCI the day arrived when agent Moline told CARACCI that he could solve his tax problem if he would pay $7,500.00. CARACCI agreed.

No agreement as to terms of payment was reached. CARACCI stated that in the past he has paid taxes in cash — over the counter — by check — in person — and even out of the cash register of an operating business.

It was decided between Moline and CARACCI that the money would be paid in two installments of $2,500.00 and $5,000.00. CARACCI said he made the first payment in good faith, and received therefor a signed receipt from the Internal Revenue Service agent.

In between the first and second payments, CARACCI received an official communication from Chester Usry, the District Director of the Internal Revenue Service, indicating there would be "no change" or no difference in the amount of tax presently owed and the amount owed before the Moline audit.

It was at this time that CARACCI said he became aware of the fact that the $2,500.00 he had given Moline had not gone into the United States Treasury.

Thereafter, CARACCI states he became distraught, worried and afraid. He states that he decided to follow through and pay off the other $5,000.00 to "get the government off my back."

CARACCI admits that he gave the Internal Revenue Service agent the second payment, well knowing he was not going to turn it in to the government, only because he didn't know what else to do, as he said, "I had gotten into deep water by making the first payment". He repeatedly stated the first payment was made in good faith in the belief that he was paying his tax liability.

The opinion of the Court below contains the following allegations in the Statement of Case:

> "It was agreed that Moline would be paid $7500 as follows: $2500 in one week and $5000 after Caracci received a 'No Change Letter' from the IRS indicating that his tax returns had been cleared." Appendix A.

This is error. CARACCI had already paid his tax, then an Internal Revenue Service audit was started on this tax. An Internal Revenue Service audit is seldom started for overpaid taxes. Certainly the taxpayer had a right to believe that the audit would produce more tax liability. The first payment of $2500 CARACCI said was made in good faith. In substantiation thereof this record contains the receipt of an Internal Revenue Service agent. The "No Change Letter" informed CARACCI that his original tax payment was correct and that obviously the $2500 went somewhere other than in the United States Treasury.

Petitioner acknowledges the questionable propriety of the inclusion of the above in this section entitled Statement of the Case, however, in justification thereof he has designated and printed every word of the transcript of testimony as the record of this case.

REASONS FOR GRANTING THE WRIT

1. Whether Entrapment Is A Matter To Be Determined By Judge Or Jury.

CARACCI defended himself with the simple and straight-forward acknowledgment that he had given the second of two payments to the government agent knowing that the payment was highly irregular, wrong

and most probably an outright bribe. CARACCI told the jury that he had done this only because of government pressure, and because of the circumstances in which the government had placed him.

It was the defense position that the government used undue and illegal force, and persuasion to make CARACCI pay the second installment because of the continuing threat of a still incompleted tax audit. All defense counsel concurred that the best defense for CARACCI would be a complete and unrestricted introduction of all of the government efforts to get CARACCI to make an illegal payment. For example, the record of approximately thirty government attempts to call the accused or his associates within a twenty-four hour period seemed fair and competent evidence to prove that the government was doing everything in its power to manufacture a crime.

The doctrine of entrapment is a fair and fundamental concept of criminal justice, but the procedural rules for invoking the doctrine do havoc to several constitutional principles.

The right of the accused to take the stand in his own behalf is denied to the hapless accused who would plead entrapment.

The test of entrapment is still the "origin of intent", and what accused can successfully deny that the origination was his unless he take the stand to deny it. And, once he has taken the stand to deny the "origin of intent" the jury must witness the results of the cross

examination of an amateur witness by a professional interrogator.

But the travesty has only begun, for the accused has made the plea of entrapment and as with any other pleader he must prove his pleading. Therefore, on the witness stand and in front of the jury an accused and his witness must prove that the "creative activity" of presumably proper police officers is the sole reason that he is standing trial. This task is insurmountable, and in the opinion of petitioner thoroughly inconsistent with the fair trial concept that presumes an accused to be innocent.

This travesty continues with Fifth Amendment overtones; for, to plead entrapment before the jury an accused must necessarily confess to the commission of the crime and then prove that some respected police officer thought up the crime and made the unfortunate accused commit same.

Repeatedly both before and during the trial counsel for petitioner pleaded with the trial judge to determine as A MATTER OF LAW that entrapment was here present.

The trial Judge said no. And, of course, the flat refusal was well buttressed by *Sorrells* and *Sherman*[1] in which the question of entrapment was held A MATTER OF FACT for determination by the jury.

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[1] ***Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1952).**

Petitioner submits the theory of entrapment is a beautiful concept in the administration of criminal justice, but that in practical criminal practice it is non-existent. Few criminal defense lawyers are brave enough to allow an accused to confess before a jury, and accept the ridiculous burden of attempting to prove that reputable law enforcement officials conceived the crime and induced the accused to commit it. Not only that, the defense attorney who pleads entrapment must forever forget the classical defenses of alibi, lack of identification or adequacy of proof.

It seems that in *Simmons*[2] this Court once said that it would be preposterous to have to waive one constitutional right in order to invoke another. Or, that in a motion to suppress one did not have to give up Fifth Amendment rights to invoke Fourth Amendment guarantees. And, it cannot be overstressed that in *Simmons* this Court was considering the accused rights in a pretrial motion before the Judge alone. In the plea of entrapment for this accused he was forced in front of a jury to waive at least one constitutional right to plead the fleeting constitutional guarantee against entrapment.

Stricti juris application of *Sorrells* and *Sherman* can and did lead to injustice, however, petitioner insists that he repeatedly suggested a solution to this constitutional massacre both before and during trial.

Petitioner pled — no, begged — the trial Judge to decide the issue of entrapment as a matter of law and

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[2]*Simmons v. United States*, 390 U.S. 377 (1968).

save the accused from the slaughter that must follow from the "I confess and I accuse" type of entrapment plea.

The solution: The determination of the sufficiency of evidence is a determination of fact. The determination of the absence of all evidence is a matter of law. Now for the n'th time petitioner suggests that the trial judge could and should have at least considered the evidence to determine whether there was any evidence of the "origin of intent" being attributable to the accused. After all the accused pre-trial had pleaded entrapment and denied existence of any "origin of intent". Had the trial Judge heard the evidence and concluded that there was no evidence whatsoever that the accused was responsible for the origin, then as a matter of law he could say that further prosecution was barred by the law of entrapment.[3] *Sorrells* and *Sherman* would remain unchallenged and the administration of justice would have been spared the spectacle of an accused giving up one constitutional right in order to urge another, and then in the end lose all three.

Petitioner does mean three. He asks only brief indulgence to prove that he did gamble a lesser right to gain a greater right and lost three. On this record he gave up Fifth Amendment rights by taking the stand to plead entrapment. He did this in front of the jury as directed, and when he did so he lost his Sixth A-

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[3]**Federal Rules of Criminal Procedure, Rule 12(b) (1) states: "Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion."**

mendment right to a fair trial. Petitioner believes this is so because he cannot envision any trial to be fair wherein the accused is forced to take the stand and in front of the jury deny the "origin of intent" to commit a crime — and then be required to accuse, and prove responsible unindicted persons were guilty of a crime, or at least the "origin of intent" to commit a crime.

The accused is denied a fair trial not only by these procedural requirements but also by the complexity of the Court instruction on the matter of entrapment. Confusion must follow from an instruction based on *Sorrells* or *Sherman*. More confusion must result from a "SYNTHESIZED"[4] version of both. The petitioner questioned the charge because in his opinion this synthesization included not only the *Sorrells-Sherman* majority opinions on entrapment, and in addition thereto included the divergent entrapment criteria contained in the concurring opinions. The totality of which had to be beyond the comprehension of the jury. The questioned charge is as follows:

> "Now, the defense has been raised here of what is known in the law as entrapment and I'll give you the law with respect to that defense. I charge you that the plea of entrapment is a legal defense and if you find from the evidence that the United States through one of its

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[4]The Fifth Circuit opinion stated: "The trial court's charge was synthesized almost verbatim from the opinions in *Sherman* and *Sorrells*; it is a full and fair charge, and its submission was entirely proper in these circumstances. Appropriate excerpts from the charge are quoted in the margin."

agents is responsible for the defendant violating the law which he would not have otherwise violated, then I charge you that you are to find the defendant not guilty. Now, in that respect you will consider all the facts, of course, and circumstances surrounding this case and the law on the question of entrapment which I am now about to give you.

Now, the term entrapment signifies instigation of the crime by officers of government. Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. The pertinent question is whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials or agents. The fact that officers and employees of the (1108) government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and strategy may be employed to catch those engaged in criminal enterprises. Decoys may be used to catch criminals and to present opportunity to one intending or willing to commit crime. Therefore, when a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is not entrapment.

But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates not with the accused but is conceived in the mind of the government officer and the accused is, by persuasion, deceitful representation or inducement lured into the commission of the criminal act, the government is estopped by sound public policy from prosecution thereof. When a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment and the law as a matter of policy forbids his conviction in such a case. So that the pertinent question is whether (1109) a defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activities of its own officials, agent or agents.

The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, a different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and

> induce its commission in order that they may prosecute. If you find that the officials of the government implanted in the mind of the defendant the disposition to commit the offense in question you are instructed to find the defendant not guilty."

Four words from the contested charge cannot resolve this challenge, but they most certainly can set the tenor of that charge. These words, 'Policy' and 'Sound Public Policy', when used to describe entrapment, seem to indicate public concern for law enforcement — as did the minority Justices in *Sorrells* and *Sherman* — rather than a concern as to the guilt or innocence of the accused, as did the majority Justices.

Petitioner believes that the "administration of justice" criteria for the determination of entrapment is included in part, or indirectly in this charge, and that is not the law of this land.

2. Whether The Accused Was Denied A Fair Trial By A Jury He Did Not Select.

The character of the prosecution was demonstrated very early in the trial. When this case was called for trial three accused were at the bar. Jury selection began, and each of the three defendants independently and systmatically excluded various jurors from the panel. Sometime after defendant CARACCI'S challenges were exhausted, a jury was selected. Upon the jurys' being sworn a short recess was called for the benefit of the jurors. Immediately thereafter, defendant Adams announced to the Court his intention

to plead guilty and testify for the government. A stormy session followed in which the defendant Adams did plead guilty amid severe questions of prior collusion with the government. Motions for a continuance were denied and the remaining defendants were told to prepare for trial. Subsequently, but still prior to the first witness being sworn, the Judge, without a request and without counsel for Vaucresson being present severed defendant Vaucresson and told defendant CARACCI to prepare for the first witness. After denial of all defense motions the Judge called in the jury, informed them *twice* that one of the defendants had already pleaded guilty and then instructed the government to go forward with its proof. The first witness was then sworn.

The trial Judge after informing the jury that one of the three accused had acknowledged his guilt in this conspiracy by entering a plea of guilty, told them that they were not to concern themselves with what happened to the other accused.

The severance of Vaucresson and the guilty plea of Adams at about the same time are incidents that detract from the overall fairness of this trial. Also at the same time the CARACCI defense was dealt a near lethal blow when the Judge made an opening statement immediately before the government in which he told the jury that one of the three men up for trial had already admitted his guilt by a plea. Actually, he told the jury this twice. (App. 75, 6)

Defense counsel openly admitted they were stunned by this unexpected turn and were unprepared to de-

fend the case in its radically changed posture. A continuance was asked for time in which to adequately prepare a defense for the accused. The trial Judge admitted the fast changing events could "... certainly change the approach the defendant might use for the theory of their case." (App. 38) The remainder of this quotation is an interesting insight as to the Court's thinking. The Judge then said:

> "It could possibly be prejudicial and unfair. I think the purpose of trial is to be a fair trial. That's the whole purpose. If it's not fair that's not good." (App. 38)

The course that this case took may or may not have been a surprise to the prosecutor. After the guilty plea and immediately before the opening statement for the government, defense counsel asked for, and were denied, motions for continuance and mistrial. During the stormy course of the hearing on these motions, the trial Judge attempted to find out when it had been decided that this accused would enter the guilty plea. The answers he received were somewhat evasive, but the Court did elicit the admission from the defense counsel that he had a "prior commitment" to plead guilty, and that, on various occasions and as late as on the Sunday before the Monday trial, he had visited the prosecutor, had discussed the guilty plea and had listened to tapes to refresh his memory. The trial Judge questioned no one other than the defense attorney. (App. 30)

Had the Judge questioned the prosecutor, he might have asked him how he happened to have a prepared

opening statement in which he stated the guilty pleader would testify for the government. He could have asked him how in an opening statement he could say this recent defendant was even going to testify, and how he could state in detail precisely what the former defendant was going to say that would help the government convict his other two conspirators.

The odor of collusions seemed so stormy to defense counsels, that it was the subject of a heated Court debate in which the Judge himself questioned defendant Adams counsel. Certainly the taint of prejudice was sufficient to require *at least* a continuance.

The CARACCI defense included considerable thought and preparation. Interminably long and boring recordings were studied and restudied. Endless hours were spent in reading, analyzing and collating seemingly meaningless tapes of clandestine eavesdropping.

Always this was the joint effort of the defense counsel for CARACCI, Vaucresson and Adams. It was not only a joint effort, it was a cooperative team effort. At no time during the tedious preparation of this case was there the slightest hint that any one of the three defendants would be absent from the prisoners dock on the day of trial. And, certainly there was no indication that CARACCI would stand alone on the day of trial, and be forced to face one of these former associates as his accuser.

Certainly CARACCI knew that Vaucresson had repeatedly tried to have his case severed. CARACCI

knew that the Court had on more than one occasion considered the matter of severing one or more of the defendants — and CARACCI knew the severance had been denied. CARACCI and his counsel had faith in Court, and believed that the severance question had been adjudicated.

Of course, it had been adjudicated. But the CARACCI counsel made the mistake of relying too much on this adjudication. The CARACCI counsel can only say that their preparation was long, tedious and conscientious — but it did not contemplate the severance of the defendant Vaucresson on the very first day of trial, before any evidence had been taken, and even without his counsel being present.[5]

But this shocking development on the day of trial did not leave counsel completely defenseless, for shock even of this severity could be minimized by time, and so CARACCI sought a brief delay. This was summarily denied.

This Court cannot condone a prosecution as a "game" or a "war of nerves", and all that can here be added is that the record of the transcript does not contain any indication whatsoever that the severed Vaucresson would not appear as a prosecution witness.

Needless to say, counsel for CARACCI spent much recess time considering what pre-trial confidences had been exchanged with Vaucresson, and what the prose-

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[5]There is some question as to the legality of this severance, *Raymond Downum v. United States*, 10 L.ed 2d 100, 83 S.Ct. (1963).

cution could do with this information. Vaucresson never did become a government witness — as the other defendant, Adams did — but the poise and preparation of the CARACCI defense suffered by the distraction.

But Adams did testify for the government. He and his counsel shared in all of the pre-trial conferences and confidences of the joint defense effort, and on the first day of trial he shared the responsibility of selecting the jury. Then as suddenly as the summer storm he changed from co-defendant to star witness for the prosecution. A grateful government rewarded him with a sentence of one half that awarded to CARACCI.

This time again counsel for CARACCI did the only conceivable thing possible to regroup the defense. They asked for a continuance, and it too was denied.

And so CARACCI after months of preparation for one type of defense suddenly stood alone faced with a conspiracy trial, face to face with his former confidant, who for the hope of reward was going to testify that the conspiracy did exist and that CARACCI was part of it.

Certainly this was a shocking development and a hindrance to his defense. The subsequent plea for a continuance would seem to be a minimum request under Sixth Amendment concepts of a fair trial. It also seems that the same constitutional concept would have demanded this delay when it becomes known that all, or almost all, of the foregoing was done in the presence of the jury. The jury that tried CARACCI saw three defendants at the bar on the first day of trial, soon

after there was only CARACCI, and on the following days this same jury saw the erstwhile accused Adams perform as a star witness for the prosecution.

A continuance could have afforded CARACCI the opportunity to group his defenses and obtain the same results Vaucresson obtained in his subsequent trial for he was acquitted.

3. Was Petitioner Deprived Of His Right To Final Summation.

Petitioner believes that the rights of CARACCI were violated by denying his counsel equal and fair opportunity to summarize and argue the quality and effect of the testimony taken in a seven day trial.

To preface the above, whatever preparation was done for the trial of CARACCI encompassed the joint efforts of several lawyers. From the very beginning, it was agreed that two lawyers would divide the final argument or summation. The undersigned assumed that this would be permissible, for, in their combined memory, no request to divide summation time had ever been denied in the Eastern District of Louisiana.

So, in preparation for joint summation, one common list of arguments or points to be stressed was prepared both before and during trial. Between counsel, it was agreed that any one of these arguments could and would be stressed by both counsel.

This understanding was arrived at with the knowledge that a summation is not subject to the objection of "repetition". Counsel also were well aware of the

established principle of psychology, that emphasis is added to the written or spoken word by either position or proportion. Position needs no explanation other than the notation that the dramatic opening, climax and close of an argument add emphasis and stress the content of the dramatic. Proportion means not only that the important parts of an argument are assigned more time, but also that emphasis is added by the repetition of a matter to be stressed. *Rothblatt: Successful Techniques in the Trial of Criminal Cases.*

With this in mind, the two CARACCI counsel agreed that the important phases of the argument would be stressed by both counsel.

To the surprise of CARACCI counsel, the Court appeared reluctant to allow a division of argument. And when he did so — in the presence of the jury — he informed the counsel that they were not to repeat the same arguments. Even more shocking is the fact that the Judge — again in the presence of the jury — informed the prosecutor that he was to scrutinize the arguments of defense counsel and object when he observed the second counsel repeating the arguments advanced by the first counsel. (App. 1018)

As a matter of fact, the prosecutor did not interrupt the summation, but the trial Judge did. (App. 1059) The effect of this was disarming and disastrous. It disrupted a legitimate train of thought and precluded the use of the most effective method of presentation. The dampening effect on counsel, to have the Court stop him in the middle of an argument with words to the effect — "we have already heard that, go on

to something new" — is, to say the least, chilling, and the equivalent of denying a sacred right of defense. That is, the right to argue a case in final summation.

CONCLUSION

The concept of the entrapment doctrine includes the protection of many fundamental constitutional rights. The adjective law on the matter of entrapment destroys many of these rights, and even though petitioner has suggested a proper resolution of the CARACCI matter under existing procedures, he prayfully suggests the "long hard look" at the full procedural picture of entrapment. He further suggests this Court grant defendant a new and fair trial for the errors stated.

Respectfully submitted,

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PROOF OF SERVICE

I, Guy Johnson, attorney for petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for Writ of Certiorari upon the Solicitor General, Department of Justice, Washington, D.C., and the United States Attorney for the Eastern District of Louisiana, New Orleans Division, 500 St. Louis Street, New Orleans, Louisiana.

New Orleans, Louisiana, July ____, 1971.

GUY JOHNSON

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29832

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANK JOSEPH CARACCI,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

(June 2, 1971)

Before CLARK, Associate Justice,* and GEWIN and RONEY, Circuit Judges.

GEWIN, Circuit Judge: Appellant Frank Caracci was indicted in New Orleans with two other alleged conspirators on three counts charging conspiracy[1] to bribe and bribery of a public official in violation of

*Associate Justice of the United States Supreme Court (Ret.), sitting by designation.

[1]A conspiracy was charged within the meaning of 18 U.S.C. § 371 which proscribes a conspiracy to commit any offense against or to defraud the United States or any agency thereof.

18 U.S.C. §§ 2,201(b), 201(f). One of the accused, John Q. Adams, pled guilty, and the other, Robert Vaucresson, was granted a severance. Appellant Caracci was found guilty on all counts after a jury trial. He was sentenced to one year in prison and fined $10,000. We affirm.

In 1968 Internal Revenue Service Agent A. J. Moline began a routine audit of Caracci's income tax returns for the years 1965, 1966 and 1967. On February 7, 1969, Agent Moline's stockbroker, John Q. Adams, made overtures which led him to believe that he would be offered a bribe to settle the tax affairs of Caracci through other than legal means. Agent Moline promptly contacted his Regional Inspector to report the overtures and to ask further instructions. A special inspector was dispatched to New Orleans to supervise further investigative activities. Agent Moline was carefully instructed to "play along" with whatever suggestions might be made, but under no circumstances was he to initiate conversations with anyone on the bribery subject. There is ample evidence in the record to indicate that Moline carefully followed these instructions.

In order to arrange a meeting with Caracci and to discuss the terms of the proposed illegal agreement, there ensued a large number of meetings and telephone calls between Adams and Agent Moline. In the course of these activities, Agent Moline conversed with a third conspirator, Robert Vaucresson, whose function it was to act as a liaison between Adams and Caracci. Almost all of these conversations were

recorded by Internal Revenue Agents through the use of an electronic device concealed on the person of Agent Moline and a telephone "bug."[2]

On March 3, 1969, Agent Moline, equipped with a concealed transmitter, finally met with Caracci at Caracci's place of business, the "500 Club" in New Orleans. Because Caracci was wary of eavesdropping, all negotiations concerning the bribery were conducted by passing written notes back and forth; the notes were burned at the end of the meeting. It was agreed that Moline would be paid $7500 as follows: $2500 in one week and $5000 after Caracci received a "No Change Letter" from the IRS indicating that his tax returns had been cleared. These sums together with an additional $1000 for division between Adams and Vaucresson were delivered as agreed at further meetings between Caracci and Agent Moline on March 10 and April 9. Notes were again passed at the March 10 meeting and burned at its conclusion. Caracci was arrested on April 14, 1969.

Appellant first argues that *Katz v. United States*[3] should be read as implicitly overruling *On Lee v. United States*[4] to condemn on Fourth Amendment grounds the use of evidence obtained as a result of his conversations with a "bugged" agent. Any doubt concerning the lack of merit of this claim has been squarely resolved by the Supreme Court in *United*

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[2]These tapes were not used at trial by the prosecution. Agent Moline gave all of his testimony from memory.

[3]389 U.S. 347 (1967).

[4]343 U.S. 747 (1952).

States v. White.[5] Quoting from *On Lee* the Court concluded:

> "'It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment there.' 343 U.S., at 753-754. We see no indication in *Katz* that the Court meant to disturb that understanding of the Fourth Amendment or to disturb the result reached in the *On Lee* case, nor are we now inclined to overturn this view of the Fourth Amendment.
>
> "Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. *Hoffa v. United States*, 385 U.S. 293, 300-303. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant,

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[5] ____ U.S. ____ [No. 13, April 5, 1971]. At oral argument, on February 4, 1971, it was agreed that the Supreme Court's decision in *White* might be dispositive of the Fourth Amendment issue presented. Accordingly, final decision in this case was postponed until after that decision was handed down.

> either (1) simultaneously records them with electronic equipment which he is carrying on his person, *Lopez v. United States, supra;* (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. *On Lee v. United States, supra.*
>
> . . .
>
> "It is thus untenable to consider the activities and reports of a police agent himself, though acting without a warrant, to be a "reasonable" investigative effort and lawful under the Fourth Amendment but to view the same agent with a recorder or transmitter as conducting an "unreasonable" and unconstitutional search and seizure."[6]

Appellant's second contention strikes at the court's treatment of allegedly prejudicial public statements and press releases. On February 16, 1970, the first day of trial, the prosecutor, Assistant U.S. Attorney Julian Murray, and his immediate supervisor, U.S. Attorney Gerald Gallinghouse appeared on a taped television interview seen locally in New Orleans. In it they allegedly acknowledged the threat of "Organized Crime" in the community and promised vigorous enforcement of the laws. On the following day, appellants moved for a mistrial and asked for a court order prohibiting further such utterances. Both requests were

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[6]Ibid. Slip Opinion at 5, 8 (footnote omitted). Cf. United States v. Hernandez, _____ F.2d _____ (5th Cir. 1971) [No. 30339, April 5, 1971].

correctly denied, the court having in no way abused the discretion accorded it in *Gordon v. United States*.[7] The remarks themselves were strictly of a general nature. Appellant makes no contention that he or any of his co-defendants were named or in any way alluded to; nor does he complain of even an indirect reference to his trial. Moreover, he has not convinced us that any part of the prosecution's case improperly connected him with the statement by further reference to the problem of "Organized Crime." Additionally, even if the remarks could be remotely construed as prejudicial, appellant has given us no reason to believe that any member of the jury disregarded the court's clear and unequivocal instructions to avoid exposure to news releases or other publicity related to the trial.

Appellant next complains that he was impeded in proper preparation for the trial because the prosecution deliberately and unfairly "suppressed, withheld, expunged, and edited evidence" necessary to the appellant's defense. These contentions are groundless. The record shows that the prosecution was scrupulously fair in affording appellant more than ample access to all evidence to which he was entitled and in fact disclosed appreciably more than is required by law.[8]

Appellant's principal defense at trial was entrapment; he sought to show that Agent Moline initiated the crime by negotiating as if to arrive at a legitimate settlement of Caracci's tax deficiencies. Only after receipt of a "No Change Letter", Caracci argues, did

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[7] 438 F.2d 858, 872-73 (5th Cir. 1971).

[8] See, e.g., 18 U.S.C. § 3500; Brady v. Maryland, 373 U.S. 83 (1963); Fed.R.Crim.P. 16(a).

he perceive his involvement in an illegal arrangement, and it was then too late to withdraw. Appellant asserts on his fourth point that the court's charge on the entrapment issue did not comport with *Sorrells v. United States*[9] and *Sherman v. United States*.[10] We cannot agree. The trial court's charge was synthesized almost verbatim from the opinions in *Sherman* and *Sorrells;* it is a full and fair charge, and its submission was entirely proper in these circumstances.[11] Appropriate excerpts from the charge are quoted in the margin.[12]

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[9]287 U.S. 435 (1932).

[10]356 U.S. 369 (1958).

[11]See United States v. Mann, 432 F.2d 53 (5th Cir. 1970); Gros v. United States, 376 F.2d 812 (5th Cir. 1967); Collier v. United States, 301 F.2d 787 (5th Cir. 1962).

[12]I charge you that the plea of entrapment is a legal defense and if you find from the evidence that the United States through one of its agents is responsible for the defendant violating the law which he would not have otherwise violated, then I charge you that you are to find the defendant not guilty. Now in that respect you will consider all the facts, of course, and circumstances surrounding this case and the law on the question of entrapment which I am now about to give you.

Now, the term entrapment signifies instigation of the crime by officers of government. Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. The pertinent question is whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials or agents. The fact that officers and employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution.

. . .

When the criminal design originates not with the accused but is conceived in the mind of the government officer and the accused is, by persuasion, deceitful representation or inducement lured into the commission of the criminal act, the government is estopped by sound public policy from prosecution thereof.

Appellant's fifth objection is that the trial court improperly informed his two trial counsel that they were not to offer repetitious arguments in summation and then interrupted the second attorney's argument on one occasion to say "we have already heard that, go on to something new." It is our opinion that the trial court was well within the bounds of his discretion in making this comment.[13]

Appellant's final contention, raised for the first time on appeal, is that the trial court exercised undue pressure on the jury to reach a verdict by allowing them to continue their deliberations until they reached a verdict at 10:00 p.m. This contention is without merit. The length of time of jury deliberation is a matter

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When a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment and the law as a matter of policy forbids his conviction in such a case. So that the pertinent question is whether a defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activities of its own officials, agent or agents.

The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, a different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute. If you find that the officials of the government implanted in the mind of the defendant the disposition to commit the offense in question you are instructed to find the defendant not guilty.

[13]See Hale v. United States, 410 F.2d 147, 152 (5th Cir. 1969); Davis v. United States, 409 F.2d 1095 (5th Cir. 1969).

of discretion of the trial judge; without more, it cannot constitute coercion.[14] The record fails to indicate any such coercion. Indeed, about thirty minutes before the verdict was returned, the court instructed the jury that they need not show reticence in requesting additional time to deliberate.

Our review of the record and all of appellant's contentions convince us that no prejudicial error was committed during his trial.

Judgment AFFIRMED.

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[14]DeVault v. United States, 338 F.2d 179 (10th Cir. 1964); Kowalsky v. United States, 290 F.2d 161 (5th Cir. 1961) cert. denied 368 U.S. 875; cf. Burroughs v. United States, 365 F.2d 431 (10th Cir. 1966).

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29832

D. C. Docket No. CR 31731

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

FRANK JOSEPH CARACCI,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before CLARK, Associate Justice,* and GEWIN and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court

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*Associate Justice of the United States Supreme Court (Ret.), sitting by designation.

for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued As Mandate: June 2, 1971

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29832

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

FRANK JOSEPH CARACCI,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(June 25, 1971)

ON PETITION FOR REHEARING

Before CLARK, Associate Justice*, and GEWIN and RONEY, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Pet. for rehearing fld. 6/15/71

Pet. for rehearing denied 6/25/71

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*Associate Justice of the United States Supreme Court (Ret.), sitting by designation.

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No. 71-116

In the Supreme Court of the United States

OCTOBER TERM, 1971

FRANK JOSEPH CARACCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
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OPINION BELOW

The opinion of the court of appeals is not yet reported (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1971. A petition for a writ of certiorari was filed on July 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established entrapment as a matter of law.

2. Whether petitioner was afforded a fair trial by an impartial jury.

3. Whether petitioner was deprived of his final summation.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana,[1] petitioner was convicted of paying unlawful bribes and gratuities to an Internal Revenue Service agent, in violation of 18 U.S.C. 201(b) and (f), and of conspiring to pay unlawful bribes and gratuities in violation of 18 U.S.C. 371. He received concurrent prison sentences of one year imprisonment and was fined $10,000. The court of appeals affirmed (Pet. App. A).

The facts are set forth in the opinion of the court of appeals. In November of 1968, Internal Revenue Service Agent Moline began a routine audit of petitioner's 1965, 1966, and 1967 income tax returns (Tr. 100-102, 157).[2] On February 7, 1969, agent Moline received a telephone call from petitioner's stockbroker, John Quincy Adams, in which Adams said that he wished to discuss a matter with the agent

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[1] After the jury was sworn co-defendant John Quincy Adams pleaded guilty, and the case of co-defendant Robert Vaucresson was severed.

[2] We are lodging with the Clerk a copy of the transcript of trial ("Tr.").

which could not be discussed over the telephone (Tr. 102). The next day the agent telephoned Adams. During the course of the conversation Adams asked the agent if he could "do something" for petitioner (Tr. 104). Suspicions aroused, the agent immediately contacted his Regional Inspector and informed him of the telephone conversations. On February 10, Adams again telephoned agent Moline and said, "You know this matter I talked with you about Saturday could be more interesting than I thought" (Tr. 104-106).

Internal Revenue Service Inspector Fonville arrived in New Orleans on February 11 to supervise further investigation of the attempted bribery of Moline (Tr. 651-653). Agent Moline was instructed that under no circumstances could he do or say anything that would cause anyone to offer a bribe to him, but once a definite overture had been made, he could acquiesce and accept whatever was offered him (Tr. 654, 657, 668-669, 747-748, 769, 771).

Beginning on February 12, Moline had numerous telephone conversations and meetings with Adams relative to the agent's "eas[ing] up or get[ting] out," of petitioner's tax examination (Tr. 110-111 113, 116-117, 118-119, 123-124). On February 26, during the course of the conversations, Adams telephoned Agent Moline and told him that one "Sonny" Vaucresson was "in on the deal" and that Vaucresson was going to act as an intermediary between the agent and petitioner (Tr. 130-133).

On March 3, Moline met petitioner at his place of business. Petitioner, apparently fearing electronic

eavesdropping, produced a pad and pencil and wrote "[w]hat will you do for me for a moderate sum." (Tr. 147-148). Written negotiations concerning the bribery were passed back and forth until it was finally agreed that petitioner would pay the agent $2,500 shortly and $5,000 more after petitioner received a "no change letter" from the Internal Revenue Service indicating that his tax audit revealed no additional tax liability (Tr. 158, 177). The notes evidencing the bribe offer were destroyed at the end of the conversation (Tr. 150).

On March 10, Agent Moline again met petitioner at his place of business (Tr. 161-162). After some negotiations, petitioner gave the agent $2,500 in cash in return for the agent's written receipt (Tr. 165-166, 176).

On April 1, Inspector Fonville mailed a "no change letter" to petitioner (Tr. 179, 682, 740-742). On April 7, Agent Moline spoke with petitioner and was told that petitioner had received the "no change letter" (Tr. 180). On April 9, Agent Moline met petitioner at his place of business (Tr. 186) and, after both oral and written communications, petitioner gave the agent $6,000—$5,000 for the agent and $1,000 to be divided equally between Vaucresson and Adams (Tr. 187). Petitioner and his co-defendants were arrested on April 14 after Vaucresson and Adams received $500 each from Agent Moline as payment for their participation in the scheme (Tr. 194-197, 234, 694, 928).

ARGUMENT

1. The court of appeals correctly held that petitioner was not entrapped as a matter of law (Pet. App. 6a-8a). The evidence showed that Agent Moline merely acquiesced to overtures made by Adams and petitioner. There was no proof that Moline had implanted the idea to commit the crime in Adams' or petitioner's minds. Rather petitioner, through Adams, initiated the offer to settle his tax deficiencies by other than lawful means, and thereafter continued in this course of conduct without prodding from the agent. The evidence falls far short of entrapment. *Osborn* v. *United States*, 385 U.S. 323, 331-332; *Sherman* v. *United States*, 356 U.S. 369, 372; *Sorrells* v. *United States*, 287 U.S. 435, 441-442. Resolution of this question was therefore properly left to the jury.[3] See *United States* v. *Henry*, 417 F. 2d 267, 269-270 (C.A. 2).

2. Petitioner argues that he was deprived of a jury of his own choice because he had to share his peremptory challenges with co-defendants who ultimately were not tried with him (see *supra*, note 1). This issue was not presented in the court of appeals and need not be reviewed at this juncture. In any event, the claim is without merit. It is well settled that defendants charged with a non-capital offense,

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[3] Petitioner's claim that the court's instructions to the jury on the issue of entrapment were erroneous is similarly without merit. As the court of appeals noted (Pet. App. 7a), the charge was synthesized almost verbatim from the opinions of *Sorrells*, *supra*, and *Sherman*, *supra*, and was both full and fair.

whether tried singly or jointly, are entitled to no more than ten peremptory challenges as a matter of right. Rule 24(b), Fed. R. Crim. P.; *United States* v. *Gleeson*, 411 F. 2d 1091, 1095 (C.A. 10); *United States* v. *Crutcher*, 405 F. 2d 239, 245 (C.A. 2), certiorari denied, 394 U.S. 908; *Gradsky* v. *United States*, 342 F. 2d 147 (C.A. 5), certiorari denied, 382 U.S. 846; see *Stilson* v. *United States*, 250 U.S. 583. At the time the jury was empaneled both Vaucresson and Adams were parties to the suit and entitled to exercise their peremptory challenges. The jury as constituted was accepted by all counsel (Tr. 3-4). The subsequent severance of Vaucresson's[4] case and the acceptance of Adams' plea of guilty[5] did not entitle petitioner to additional challenges. *United States* v. *Macke*, 159 F. 2d 673, 674-675 (C.A. 2), certiorari denied, 331 U.S. 810; see also *Jackson* v. *United States*, 408 F. 2d 306, 308-309 (C.A. 9); *Hanson* v. *United States*, 271 F. 2d 791, 793 (C.A. 9).

Petitioner's claim that the court prejudiced the jury by informing them that Adams had pleaded guilty is similarly baseless. In light of the court's cautionary instructions that Adams' guilty plea not be considered as bearing on petitioner's guilt (Tr.

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[4] Vaucresson was granted a severance after a colloquy between defense counsel and the court revealed the likelihood that Vaucresson's defense would be antagonistic to that of petitioner.

[5] Contrary to petitioner's assertion, the record shows that although prior discussion had occurred between Adams' counsel and the prosecutor, it was not known until the time of the plea that Adams would plead guilty (Tr. 29-33).

74-75), it was not error for the court to inform the jury of the reason for Adams' absence. *United States* v. *Mingoia*, 424 F. 2d 710, 714 (C.A. 2); *Koolish* v. *United States*, 340 F. 2d 513 (C.A. 8), certiorari denied, 381 U.S. 951; *United States* v. *Dardi*, 330 F. 2d 316, 333 (C.A. 2), certiorari denied, 379 U.S. 845.

Petitioner also contends (Pet. 16-20) that the trial judge abused his discretion in denying petitioner's motion for a continuance following Adams' plea of guilty and the grant of a severance to Vaucresson. The severance and plea of guilty occurred the day before the government's opening statement and the introduction of any evidence. The court recessed in the afternoon on Monday, February 16, 1969, and did not reconvene until the following day at 10:00 a.m. (Tr. 39-45). The trial judge did not abuse his discretion in concluding in these circumstances that petitioner had had sufficient time in which to adjust his defense.

3. As the court of appeals noted (Pet. App. 8a), the trial court acted within its permissible discretion by informing defense counsel they were not to offer repetitious arguments in summation (Tr. 1018, 1059). The court's interruption of defense counsel at one point with the comment "we are really getting repetitious on that * * *, let's go on to some new point" (Tr. 1059) did not deprive petitioner of a final summation. *Davis* v. *United States*, 409 F. 2d 1095, 1101 (C.A. 5). The record shows that defense counsel was not interrupted again, nor in any way limited in his closing argument.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1971.

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